IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
COREY M. SWISCHER,	)	**Supreme Court #SC92336**
	)	
Respondent.	)	

INFORMANT'S REPLY BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SHANNON L. BRIESACHER #53946
STAFF COUNSEL
3335 AMERICAN AVENUE
JEFFERSON CITY, MO 65109
(573) 635-7400
(573) 635-2240 (Fax)
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

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INTRODUCTION

The facts of this case suggest that Respondent took over his wife's solo practice and quickly became overwhelmed with work. Respondent began missing filing deadlines, missing statutes of limitations, missing timelines for filing discovery and missing client appointments. While Respondent would contend that these events are understandable, given his circumstances, Respondent fails to evaluate his conduct from the perspective of his clients.

Charles Gossett hired Respondent to pursue a medical malpractice action on his behalf. After the petition was filed, months passed with no indication that anything was transpiring in his case. Unable to reach Respondent and seeking some information about his case, Mr. Gossett looked on the internet and learned, for the first time, that his case had been dismissed. But why? Mr. Gossett tried for *six months* to contact Respondent and find out why Respondent had dismissed the action, but Respondent repeatedly failed to respond to Mr. Gossett's telephone calls. When Mr. Gossett was finally able to reach his attorney, Mr. Gossett learned that Respondent was not going to pursue the case and was recommending that Mr. Gossett find another attorney. Though Respondent assured Mr. Gossett that Respondent would find Mr. Gossett another attorney, more time passed and Mr. Gossett's growing anxiety compelled him to file a complaint with the Office of Chief Disciplinary Counsel ("OCDC"). Thereafter, with days until Mr. Gossett would be precluded forever from filing his malpractice action, Respondent filed the action on behalf of Mr. Gossett. These events are certainly not normal and understandable to Mr.

Gossett and they are not understandable within the confines of the Rules of Professional Conduct.

As serious as Respondent's violations of the Rules of Professional Conduct may be, it is Respondent's abject failure to take responsibility for his actions that best determines that Respondent is currently unfit to continue in the practice of law. Rather than notifying Larry Mackey of and apologizing for missing the filing deadline for an adversary complaint, Respondent refunded Mr. Mackey's fees in exchange for Larry Mackey agreeing to withdraw his complaint from the OCDC. Rather determining to communicate better with Bonnie Rash, Respondent threatened to withdraw from her representation if she did not withdraw her complaint with the OCDC. Rather than taking responsibility for multiple violations of the Rules of Professional Conduct, Respondent argues that the Rules are unconstitutionally vague. And rather than accepting that he violated his duty to his clients and the legal system, Respondent blames his secretary for the shortcomings in his practice. Without acknowledgment on the part of Respondent that he violated the Rules to the detriment of his clients, there is little chance that the problems in Respondent's practice can be rectified or that they will not be repeated in the future.

ARGUMENT

I.

RESPONDENT ADMITTED THE MAJORITY OF THE FACTS AS PLED IN THE INFORMATION WHEN RESPONDENT FILED HIS ANSWER AND IS BOUND BY ADMISSIONS MADE IN HIS ANSWER AND OTHER PARTS OF THE RECORD TO THE EXCLUSION OF THE CONTRARY STATEMENTS CONTAINED IN HIS BRIEF.

Respondent admitted the majority of the facts as pled in the Information when Respondent filed his Answer. Respondent made similar factual admissions in his deposition testimony and in other parts of the legal record. Respondent now attempts to escape the binding effect of those admissions by asserting contrary statements of fact in his brief before this Court.

A respondent is bound by his Answer to a pleading and cannot escape the legal effect when there has been no assertion that the admissions were made in error. *Peterson v. Medlock*, 884 S.W.2d 679, 684 (Mo.App. S.D. 1994) citing *Conrad v. Diehl*, 129 S.W.2d 870, 872[1] (Mo. 1939); *Boyle v. Higman Equipment Co.*, 597 S.W.2d 205, 207 (Mo.App. 1980). Further, "[a]n allegation of fact in an answer upon which the case is being tried is binding on the pleader and for the purpose of the trial such party is precluded from maintaining a contrary or inconsistent position." *Id.* quoting *Wehrli v. Wabash RR Co.*, 315 S.W.2d 765, 773[9] (Mo. 1958). Though Missouri Supreme Court Rule 84.04(f) allows a respondent to include a separate statement of facts in his brief if

the respondent is dissatisfied with the accuracy or completeness of the statement of facts as contained in the appellant's brief, the respondent is nevertheless bound by the compliance requirements of Rule 84.04 and must make accurate citations to the record. See *Pemiscot County Memorial Hosp. v. Missouri Labor and Indus. Relations Com'n*, 825 S.W.2d 61 (Mo.App. S.D. 1992). In the present action, Respondent repeatedly makes statements in his brief that find little to no support from the record and stray from the admissions to which Respondent is bound.

For example, in the case of Complainant, Larry Mackey, Respondent contends in his brief that he appeared for Larry Mackey's *first* Meeting of Creditors and that Respondent cannot be held responsible for his failure to attend the *second* Meeting of Creditors when a scheduling conflict existed. See **Resp. Brief p. 1**. The problem with Respondent's contention is that he never attended the first Meeting of Creditors. Respondent admitted in his Answer to the Information that he did not attend either of the Meeting of Creditors. **App. 39**. When asked directly at deposition whether Respondent had attended either the first or the second Meeting of Creditors, Respondent answered, "no." **App. 165**. Additionally, Respondent admitted in his Answer that he sent a letter to Larry Mackey dated July 17, 2009, wherein Respondent notified Mr. Mackey that Respondent would be out of the office for six days, including the day of the first Meeting of Creditors and would be unable to attend the first Meeting of Creditors. **App. 39**. Though Respondent admitted on these numerous occasions to failing to attend either 341 meeting, Respondent averred to this Court, without evidence of contradiction, that

Respondent had attended the first Meeting of Creditors.[1] Respondent's statement in his brief is improper.

With respect to Respondent's failure to respond to the OCDC's request for information about the complaint of Larry Mackey, Respondent contends in his brief that he did respond to Mr. Mackey's complaint, but that the response Respondent submitted was "deemed by the OCDC not to be an appropriate response." **Resp. Brief, p. 28**. Without any other evidence in the record, Respondent's statement would suggest that he provided an actual response to the

[1] Respondent based his assertion that he attended the first Meeting of Creditors on a citation to the hearing record where Respondent was asked by his counsel if he attended the first Meeting of Creditors and responded, "I traveled to Carthage on one occasion. However, meetings of creditors had been continued because Mr. Bruce had not filed his plan for the Chapter 13 plan inside of seven days of the meeting with creditors." While the record indicates that the first Meeting of Creditors was continued, the record also reflects that the "one occasion" where Respondent traveled to Carthage was not for the first Meeting of Creditors. In his deposition testimony, Respondent was asked whether he appeared at any 341 meetings and responded, "I attempted to appear at what I believe was the first meeting of the creditors. However, Sherrie Simpson had written the date down wrong on my calendar, and there was no meeting of creditors that date." It is unclear whether Respondent failed to attend the first Meeting of Creditors because he was out of town for six days or because Ms. Simpson incorrectly calendared the event.

charges made by Larry Mackey. In Respondent's Answer to the Information, however, Respondent admitted that:

i. On or about April 14, 2010, Informant provided Respondent a copy of Mr. Mackey's complaint to the OCDC and requested a response no later than April 28, 2010;

ii. Informant received no response from Respondent on or before April 28, 2010;

iii. On or about May 14, 2010, Informant contacted Respondent by letter and again requested that Respondent provide a written response to Mr. Mackey's complaint, no later than May 21, 2010;

iv. On or about May 21, 2010, Respondent provided a brief letter to Informant in which he stated only that Respondent had contacted Mr. Mackey and that Mr. Mackey had agreed to withdraw his complaint;

v. In Respondent's May 21, 2010 letter, Respondent did not provide a written response to the complaint;

vi. On or about May 27, 2010, Informant contacted Respondent by letter and informed Respondent that although Mr. Mackey may have agreed to withdraw his complaint, Informant had jurisdiction to investigate the complaint and that Informant would require Respondent's written response to the complaint no later than June 7, 2010;

vii. Informant did not receive Respondent's written response to the complaint on or before June 7, 2010;

viii. On or about July 20, 2010, Informant contacted Respondent by letter and requested that Respondent provide a response to Mr. Mackey's complaint no later than July 28, 2010 or be subject to a subpoena for appearance in Jefferson City; and

ix. Informant did not receive Respondent's written response to the complaint on or before July 28, 2010.

Respondent never answered the charges contained in Larry Mackey's complaint. Further, Informant notified Respondent that it would require an actual response to the charges (as opposed to a blanket statement that the matter had been resolved) on two separate occasions and Respondent sent nothing in response. To suggest that Respondent responded to the OCDC's requests for information misstates the facts.

Respondent makes similar contradictions in the case of Complainant, Regina Foster. For example, Respondent contends in his statement of facts that when Regina Foster's case settled it "was not simply a matter of pulling out the claims of the lien holders and issuing them checks…Ms. Foster told Swischer she made numerous payments on the various liens and she wanted Swischer to follow up with the lien holders to determine the correct amount due on each before he paid them." **Resp. Brief p. 3**. Respondent made this assertion to support his position that he was not dilatory in waiting eleven months to pay the third party medical providers. However, in Respondent's Answer, Respondent admitted to the following:

i. On or about June 23, 2009, a settlement check was issued to Regina Foster for $23,490.00;

ii. On or around July 13, 2009 Respondent received a copy of a bill from Nevada Regional Medical Center indicating that Ms. Foster owed $228.60; and

iii. On or around December 7, 2009, Respondent received a copy of a bill from Industrial Physical Therapy indicating that Ms. Foster owed $995.42.

Respondent is bound by his admissions that he received copies of bills owed to lien holders *after* Regina Foster's case settled, providing him notice of the actual amounts owed on her bill. Had Respondent paid the bills immediately after receiving the statements in question, there would have been no need to contact the lien holders to determine if the amounts were accurate. Respondent did not pay either bill until April, 2010, after Regina Foster filed her complaint with the OCDC. Respondent cannot, in good faith, now aver that the delay was due to a need to determine the correct amounts owed, particularly since the amounts owed in 2009 were the same paid in 2010.

While the appellate process allows for factual disputes between two parties, it does not permit a party who has made statements and admissions on the record to ignore those admissions during briefing. Respondent is bound by the admissions made in his Answer and on the record, to the exclusion of the factual contradictions that are now contained in his brief.

II.

THE MISSOURI RULES OF PROFESSIONAL CONDUCT ARE NOT VOID FOR VAGUENESS AND ARE NOT VIOLATIVE OF RESPONDENT'S DUE PROCESS RIGHTS WHEN APPLIED TO RESPONDENT'S MISCONDUCT.

Due process challenges to the disciplinary rules governing attorneys are reviewed in the same manner as constitutional challenges to statutes passed by the legislature. *In re Comfort*, 159 P.3d 1011, 1023 (Kan. 2007); See also *People v. Morely*, 725 P.2d 510, 516 (Co. 1986). A rule is fatally vague only if a potential actor is exposed to risk without warning of the nature of the proscribed conduct and due process is violated only when the terms of conduct are so vague that "persons of common intelligence" must guess at what is required. *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675, 682 (Tex.App.-San Antonio 1998) (citations omitted). "Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer." *People v. Morley*, 725 P.2d 510, 516 (Co. 1986) citing *Matter of Keiler*, 380 A.2d 119 (D.C.App.1977); *Committee on Professional Ethics*, 279 N.W.2d 280 (Iowa 1979); *Matter of Sekerez*, 458 N.E.2d 229 (Ind.1984).

In the present action, Respondent has challenged several of the Rules of Professional Conduct for vagueness. However, Respondent contends that the Rules are vague as understood by him and when applied to Respondent's own conduct. The correct standard in evaluating a rule for vagueness is whether the rule is readily understandable by any given attorney. Further, "[t]he requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas that find adequate interpretation in common usage and understanding." *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675, 682 (Tex.App.-San Antonio 1998) citing *State Bar of Texas v. Tinning*, 875 S.W.2d 403, 408 (Tex.App.-Corpus Christi 1994). Hence, if a rule is expressed in ordinary terms and conveys an idea that could be interpreted in common usage by the average attorney, it cannot be void for vagueness.

Respondent challenges Missouri Rule 4-8.4(d), which prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice, as "broad, sweeping and all encompassing." A similar challenge was made in the case of *In re Comfort*, where the Kansas Supreme Court noted its history of rejecting claims that Rule 8.4(d) sets up a "vague and loose standard:"

> The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary. In *Prunty v. Light Co.*, 82 Kan. 541, 108 P.802 (1910), this court, referring to Webster's Universal Dictionary, defined prejudicial as 'hurtful,' 'injurious,' 'disadvantageous.' It cannot be seriously contended that 'prejudicial' does

> not sufficiently define the degree of conduct which is expected of an attorney. *State v. Nelson*, 210 Kan. 637, 639-640, 504 P.2d 211 (Kan. 1972).

In re Comfort, 159 P.3d 1011, 1023 (Kan. 2007). Rule 4-8.4(d) is not vague in that attorneys of ordinary skill and intelligence understand the term "prejudicial" and are put on notice that conduct that is prejudicial to the administration of justice is proscribed. Respondent asserts that because the Rule does not specifically prohibit Respondent from paying money to his clients in exchange for their agreement not to participate in the investigation of the OCDC, the Rule is vague. However, Respondent misapplies the correct standard for evaluating the vagueness of the Rule. A rule need not proscribe every example or instance of misconduct in order to convey to an average attorney the commonly understood prohibition of the rule.

Respondent also contends that Rule 4-8.1(c), requiring an attorney to respond to requests for information from disciplinary authorities, is void for vagueness in that it does not state whether a lawyer should comply with the request when the lawyer is faced with other obligations under the Rules of Professional Conduct. Again, the standard is not whether the Rule is vague as to Respondent, the standard is whether an ordinary attorney would understand that when asked by disciplinary authorities to provide information, compliance is required. Respondent makes no assertion that the rule, on its face, is vague or that the proscription of the rule is unclear. Respondent asserts only that he was unsure

what to do when his time became taxed and he could not meet the obligations owed to each of his clients and the legal system. "[W]hen applying the fair notice test to rules governing lawyers, courts take into consideration the skills and resources available to lawyers to assist them in evaluating the propriety of their conduct." *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675, 682 (Tx.App. 1998) citing *People v. Morley*, 725 P.2d 510, 516 (Colo. 1986); *State Bar v. Tinning*, 875 S.W.2d 403, 408 (Tex.App.-Corpus Christi 1994). If Respondent was conflicted about the correct course of action, Missouri provides a number of resources for attorneys who believe that they are faced with ethical dilemmas, including informal advisory opinions from the Missouri Supreme Court Advisory Committee's Legal Ethics Counsel. Respondent's uncertainty regarding his own situation does not, in turn, render the Rules of Professional Conduct unconstitutionally vague.

The constitutionality of a rule is presumed and Respondent has failed to demonstrate that the Missouri Rules of Professional Conduct are unconstitutionally vague or that Respondent's due process rights were violated. See *In re Comfort*, 159 P.3d 1011 (Kan. 2007). Contrary to Respondent's assertion in his brief, the practice of law is not a right. This Court has stated that "there is no inherent right to continue in the practice of law, but rather it is a mere privilege which will be withdrawn when one proves himself unfit." *In re Wilson*, 391 S.W.2d 914, 919 (Mo. banc 1965) quoting *In re Downs*, 363 S.W.2d 679, 691 (Mo. banc 1963). Respondent's attempts to shift the blame for his conduct and

persistent refusal to take responsibility for his actions indicate that Respondent is currently unfit to continue in the practice of law.

III.

RESPONDENT IS SOLELY RESPONSIBLE FOR MEETING HIS OBLIGATIONS UNDER THE RULES OF PROFESSIONAL CONDUCT.

Respondent's brief is replete with allegations that the misconduct with which Respondent is charged in the Information is due and owing to the actions of his former secretary, Sherrie Simpson. Notwithstanding that Respondent's allegations were raised for the first time at hearing, when Ms. Simpson was not present to defend the allegations, the Rules of Professional Conduct do not permit Respondent to shift professional responsibility for his obligations as an attorney to a subordinate employee.

A lawyer often delegates tasks to secretaries and other lay persons, which is proper if the lawyer supervises the delegated work and takes complete professional responsibility for the outcome. *In re Wilkinson*, 805 So.2d 142, 146-147 (La. 2002). In the case of Regina Foster, Respondent testified that he asked his secretary to prepare checks for his signature and that "[a]s a result of his busy schedule, once he gave her the direction, he assumed it had been done and he didn't have to worry about it anymore." Resp. Brief p. 25. Respondent concludes by stating that "[t]he delay in resolving Regina Foster's Medical Liens and Excess Settlement Money was not Swischer's fault." Resp. Brief p. 8. However, it was Respondent's responsibility to make sure that the task of preparing the checks was completed. Attorneys have a responsibility under the rules of professional conduct

to ascertain whether delegated tasks are actually performed. *Attorney Grievance Com'n of Maryland v. Kimmel*, 955 A.2d 269, 289 (Ct.App. Md. 2008). In *Attorney Grievance v. Zuckerman*, the Maryland Court sanctioned an attorney for improper supervision when he assigned a non-lawyer employee to balance the firm's checkbook, but did not follow up to see that the delegated task was actually performed. 872 A.2d 693, 700 (Ct.App.Md. 2005). Similarly, in *State ex rel. Oklahoma Bar Ass'n v. Braswell*, an attorney argued unsuccessfully that he only lost track of a client's case because of the neglect of his law clerk. 663 P.2d 1228, 1231-32 (Okla. 1983). The Oklahoma Supreme Court stated, "the work of lay personnel is done by them as agents of the lawyer employing them. The lawyer must supervise that work and stand responsible for its product...[.]" *Id*. In the present case, there was nothing improper about Respondent's request that his secretary prepare the checks for his signature. However, Respondent is the person that owes the obligation to his client and to third parties to promptly deliver settlement funds and Respondent must stand responsible for the outcome if the checks are not written and delivered in a timely manner.

If Respondent's assertions are to be believed, Sherrie Simpson is also responsible for Respondent's failure to communicate with his clients as she was not giving Respondent all of his telephone messages. However, the facts do not support Respondent's assertion. Telephone call logs from Respondent's office from November, 2009 to January, 2010, when Ms. Simpson was employed by Respondent, indicate that 729 telephone messages were recorded in a book of

messages for Respondent during the eight week period, including messages that Respondent now claims he never received. It defies logic that Ms. Simpson would go to the trouble of recording over 700 phone calls in a phone log, but fail to give the messages to Respondent. Even if Ms. Simpson was failing to give Respondent all of his telephone messages, Respondent's assertion that he cannot be held responsible for failing to communicate with his clients is incorrect. "Lack of awareness of misconduct by another person, either lawyer or nonlawyer, under a lawyer's supervision does not excuse a violation of this Section." *People v. Smith*, 74 P.3d 566, 572 (Colo. 2003) citing Restatement (Third) of Law Governing Law Section 11 (2003). Finally, the lack of communication complained of by Respondent's clients went beyond a failure to return one or two telephone calls. Charles Gossett testified that despite numerous attempts to contact Respondent after Respondent dismissed Mr. Gossett's case without Mr. Gossett's permission, it was six months before Respondent agreed to speak with Mr. Gossett.

In the *Matter of Marshall*, an attorney hired a non-attorney assistant to make appointments, take phone calls and handle the mail. *Matter of Marshall*, 498 S.E.2d 869 (S.C. 1998). The attorney began giving her assistant more discretion and unbeknownst to the attorney, the assistant eventually started accepting clients and taking fees for work that the attorney did not know had been promised. *Id*. The subsequent violations of professional conduct as complained of by the clients, including a failure to communicate, appropriately handle funds and act with diligence, were ascribed to the attorney. *Id*. The Supreme Court of South

Carolina concluded that if the attorney had appropriately supervised her office, the attorney could have mitigated the damages; if the attorney had properly supervised her subordinate and attended to her duties under the rules, the damages could have been avoided altogether. *Id*. In the present case, Respondent testifies that his secretary kept the office in disarray, did not give Respondent his telephone messages, failed to complete delegated tasks, scheduled meetings without telling Respondent, and incorrectly calendared court dates and other events. At the same time, Respondent asserts that he did not fail to supervise Ms. Simpson. Respondent's contradictory position cannot successfully be maintained and Respondent's attempt to shift the blame for his misconduct to his non-attorney assistant, fails.

IV.

RESPONDENT'S RELIANCE ON ERRONEOUS PROPOSITIONS OF LAW RESULTS IN AN INCORRECT ANALYSIS OF HIS CULPABILITY UNDER THE RULES.

It is well established that an attorney may not dismiss a client's cause of action without the client's consent. See *Iowa Supreme Court Attorney Disciplinary Bd. V. Sotak*, 706 N.W.2d 385 (Ia. 2005); *In re Ballard*, 629 S.E.2d 809 (Ga. 2006); *In re Disciplinary Action against Garcia*, 729 N.W.2d 434 (Minn. 2010); *Disciplinary Counsel v. Tyack*, 836 N.E.2d 568 (Ohio 2005); and *In re Weinberg*, 587 S.E.2d 101 (S.C. 2003). Nevertheless, Respondent suggests that the decision to dismiss a case is a technical or tactical issue vested in the authority of the attorney and seems to suggest that it is not necessary for the attorney to even inform the client of the dismissal. In the case of Complainant, Charles Gossett, Mr. Gossett testified that he did not give Respondent consent to dismiss his case and the Disciplinary Hearing Panel found Mr. Gossett's testimony to be more credible than the contrary assertion of the Respondent. Respondent's dismissal of Charles Gossett's case without obtaining Mr. Gossett's consent or informing Mr. Gossett of the subsequent dismissal is a strict violation of Rule 4-1.4 as charged.

It is also well established that an attorney's failure to respond to discovery requests on behalf of a client is a violation of his or her obligations under the rules of professional conduct. See *Iowa Supreme Court Attorney Disciplinary Bd. v. Casey*, 761 N.W.2d 53 (Ia. 2009); *Disciplinary Counsel v. Andrews*, 924 N.E.2d

829 (Ohio 2010); *In re Dennis*, 188 P.3d 1 (Kan. 2008); *Attorney Grievance Com'n of Maryland v. Brown*, 2012 WL 1382227 (Md. 2012); and *In re Disciplinary Proceedings against Kohler*, 762 N.W.2d 377 (Wi. 2009). Again, Respondent incorrectly asserts that as part of his "broad or apparent powers to conduct or control the procedure of litigation," he had the right to decide whether to respond to discovery. Missouri civil procedure provides a means for an opposing party to object to disagreeable discovery requests. However, because a failure to respond to discovery requests can affect the substantive rights of the client, an attorney is not permitted to provide no response to properly submitted discovery under the guise of strategy. Furthermore, Respondent has asserted that he was not aware of all of the cases for which he was responsible, that he could not manage his obligations to his clients and find time to respond to the OCDC's requests for information, and that he missed the statute of limitations in Larry Mackey's bankruptcy case. Given the circumstances, it is more likely that the failure to respond to Charles Gossett's discovery was a result of a lack of diligence, as charged under Rule 4-1.3, than a purposeful and strategic decision by the Respondent.

Finally, Respondent has asserted that in failing to respond to the OCDC's request for information, Respondent cannot be found to have violated the Rules of Professional Conduct because he appropriately decided that the business of his law practice took precedence over his obligation to respond to disciplinary authorities. First, in making such a determination, Respondent presupposes that his ability to

tend to client matters and respond to the OCDC are mutually exclusive. More importantly, however, Respondent erroneously concludes that the decision was his to make. Stringent and candid cooperation by bar members is expected during disciplinary investigations. See *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003). If attorneys were permitted to decide, unilaterally, whether or not to respond to disciplinary inquiries, the system wholly fails. At no time did Respondent request additional time to respond to the requests of the OCDC, nor did Respondent inform the OCDC that he was having difficulty responding to the demands of his clients and the requests of the OCDC. Respondent's reliance on erroneous standards of conduct is not germane to an application of the Rules of Professional Conduct as applied to Respondent's misconduct.

V.

A SUSPENSION, AS PROPOSED BY THE INFORMANT AND RECOMMENDED BY THE DISCIPLINARY HEARING PANEL, IS THE APPROPRIATE SANCTION TO ADDRESS RESPONDENT'S MISCONDUCT.

During the course of Respondent's representation, Larry Mackey wrote letters to the bankruptcy judge and the bankruptcy trustee, detailing his problems with Respondent and his frustration at Respondent's refusal to return Mr. Mackey's dozens of telephone calls. Mr. Mackey filed pro se pleadings in the bankruptcy court because he did not believe that his concerns were being properly addressed by his attorney. And even before learning that Respondent had missed a critical statute of limitation, putting Mr. Mackey's civil judgment in jeopardy, Mr. Mackey filed a complaint with the OCDC. During the course of Respondent's representation, Charles Gossett learned via the internet that his medical malpractice action had been dismissed by Respondent without Mr. Gossett's knowledge or approval. Mr. Gossett tried repeatedly to reach Respondent by telephone, but Respondent refused to speak with Mr. Gossett for six months. Fearing the permanent loss of his action, Mr. Gossett filed a complaint with the OCDC. And during the course of Respondent's representation, Regina Foster waited eleven months to receive settlement money that she was entitled to on the day that the settlement check was issued. Respondent would have this Court believe that he made a few trivial mistakes that resulted in minor violations of the Rules of Professional Conduct and no injury to his

clients or the legal system. The facts of this case prove otherwise and only serve to demonstrate how far removed Respondent is from the damage caused by his misconduct.

In reaching a sanctioning recommendation, the ABA Standards analyze the nature of the duty owed, the lawyer's mental state, the extent of the injury and the aggravating or mitigating circumstances. The mental state of the attorney is but one element in reaching a determination as to appropriate sanction. However, the mental states used in the ABA Standards model are defined as follows:

(1) Intentional: when the lawyer acts with the conscious objective or purpose to accomplish a particular result;

(2) Knowing: when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result; and

(3) Negligence: when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

An accurate and detailed analysis of the *mens rea* of Respondent was previously set forth in Informant's brief. However, it is worth noting that Respondent, by his own admission, committed a number of intentional acts that resulted in violations of the Rules of Professional Conduct. Respondent argues that it was his right to dismiss Charles Gossett's action without the knowledge of Mr. Gossett. Respondent's argument suggests that he intended to dismiss the case when he knew that he was doing so without Mr. Gossett's knowledge or permission. Additionally, Respondent's efforts to compel his

clients to withdraw their complaints from the OCDC were nothing short of intentional. Respondent drafted a settlement agreement for Larry Mackey containing a provision that purported to prohibit Mr. Mackey from participating in the investigation of the OCDC. Respondent also threatened to withdraw from Bonnie Rash's representation a week before her trial if Ms. Rash did not withdraw her complaint from the OCDC. Respondent's suggestion that Ms. Rash "wanted to withdraw her complaint" is directly contrary to the testimony of Ms. Rash at hearing wherein she stated that she felt she had no choice but to withdraw her complaint because she could not afford another attorney. Respondent acted with the purpose of affecting the client withdraw. Finally, Respondent, by his own admission and argument before this Court, made an intentional decision not to respond to the requests for information from the OCDC. Respondent did not engage in two negligent acts of misconduct as suggested at the conclusion of his brief.

The Disciplinary Hearing Panel heard the testimony of complainants in this case and heard the accounts of Respondent, at times requesting that Respondent provide as much detail as possible about alleged conversations and actions. In the end, the Disciplinary Hearing Panel made credibility determinations that did not weigh in the Respondent's favor. Respondent's assessment of his conduct and the damage that it caused to his clients and the legal system is indicative of Respondent's persistent refusal, throughout the pendency of this litigation, to take responsibility for the harm that he caused. As such, the remedy that best serves both the public and the Respondent is a period of suspension wherein Respondent can reassess his commitment to practicing law within the rules as set forth by this Court.

CONCLUSION

For the reasons set forth above and in Informant's Brief, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that Respondent violated Rules 4-1.3, 4-1.4(a)(1), 4-1.5(c), 4-1.15(i), 4-3.2, 4-5.3(b), 4-8.1(c), and 4-8.4(d);

(b) suspend Respondent's license to practice law; and

(c) tax all costs in this matter to Respondent, including the $1000.00 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

By: _____
Shannon L. Briesacher #53946
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2012, a true and correct copy of the foregoing was served on Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

Todd Wilhelmus
433 East 72nd Street
Kansas City, MO 64131

Attorney for the Respondent

Todd Wilhelmus
8 N. Delaware
Butler, MO 64730

Attorney for Respondent

Shannon L. Briesacher

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 5, 986 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the document for viruses and that it is virus free.

Shannon L. Briesacher